

II

THE CALIPH 'UMAR'S LETTERS TO ABŪ MŪSĀ AL-ASH'ARĪ AND MU'ĀWIYA

The authenticity of 'Umar's well known letter to Abū Mūsā al-Ash'arī on the conduct of the *qādī* has long been suspect to western scholars; Emile Tyan has shown conclusively, with an excellent coverage of sources that, as we now have it, the letter cannot be accounted genuinely to 'Umar.¹ Major early Muslim authorities do not as much as refer to it, and the Andalusian Ibn Ḥazm (d. 456/1064) rejects it positively as spurious.² This is naturally disturbing to Muslim scholars for, as Ibn Qayyim al-Jawziyya says, "This is a highly esteemed letter (*kitāb*) which the ulema accepted and upon which they constructed the bases of judgement (*uṣūl al-ḥukm*) and testimony, and the *ḥākim* and *muftī* most greatly require it".³ While Margoliouth remarks that it "whether genuine or not, is of great importance for the history of Muslim judicial institutions",⁴ Dr Muḥammad Ḥamīdullāh has made considerable researches in the effort to prove the letter genuine.⁵ He has published not 'Umar's other much briefer letter to Abū Mūsā, but another virtually identical letter which the Caliph sent to Mu'āwiya; but the possibility that the shorter letter (Abū Mūsā 2) may be connected with the famous letter (Abū Mūsā 1), as I have suggested in the *Cambridge history of Arabic literature*, 1,⁶ finds no place in his valuable collection of basic Islamic documents. Yet the

¹ *Histoire de l'organisation judiciaire en pays d'Islam*, Leiden 1960, 77-80.

² *al-Muḥallā*, Cairo 1347, 1, 59. He calls it *al-risāla al-makdhūba al-mawḍū'a* 'alā 'Umar, "the false, lying letter imposed on 'Umar."

³ *I'lām al-muwaqqi'in 'an Rabb al-'Ālamīn*, Cairo n.d., 72.

⁴ "Omar's instructions to the Kadi", *JRAS* (1910), 307 ff.

⁵ *Majmū'at al-wathā'iq al-siyāsiyya li 'l-'abd al-nabawī wa 'l-khilāfa al-rāshida*, 2nd ed. Beirut 1389/1969, 343 f. It is curious that the text of the famous letter is missing in several mss. consulted by him. Cf. *J. Pak. Hist. Soc.* (1971).

⁶ Cambridge 1983, 148-9. *Qadā'* was apparently not a pre-Islamic practice.

“improved” letter, as I regard Abū Mūsā 1, if it must lose the authority of the second Caliph, has nonetheless the validity of representing the attitudes of the Islamic ulema as they evolved in the early second century – to which it undoubtedly belongs – and to recognise it as such seems in no way to impugn the faith.

The Arabic text of Abū Mūsā 1 is well enough known not to require to be reproduced here, but concerning Margoliouth's rendering of it, Ḥamīdullāh says with some justice that “it is hopelessly unsuccessful and scarcely gives a correct idea of the contents⁷.” His own translation, however, inserts or omits material or else supplies senses not in the original. The following is an essay at a close literal translation without pretensions to elegance. The text followed is that of Margoliouth.⁸

1. Pronouncing judgement (*qaḍā'*) is an established/unequivocal ordinance and followed practice (*sunna*).
2. You must understand, when a case is contested before⁹ you, that the pronouncement of a judgement (*ḥaqq*) which cannot be put into effect is no use.
3. Act impartially between the people in your audience-room (*majlis*) and before you,¹⁰ so that the man of noble status (*sharīf*) be not greedy for your partiality and the man of inferior status (*ḍa'īf*)¹¹ despair of justice from you.
4. The onus of the proof is on the plaintiff and the oath on him who denies [the charge].
5. Conciliation (*sulḥ*) is permissible between people, except a conciliation which make licit what is forbidden or forbids what is licit.

⁷ “Administration of justice in early Islam”, *IC*, XI (1937), 169.

⁸ *Loc. cit.* Many variant readings are given by Margoliouth; further variants may occur in texts published since his time and noted by Ḥamīdullāh. These do not, however, affect the main propositions of the text to any significant extent. Lesser variants are disregarded here. On the whole, these seem to arise from defects in the script rather than oral transmission.

⁹ al-Ṭabarī, *Tafsīr*, ed. Maḥmūd and Aḥmad Shākir, Cairo 1374/1954-5 ff; III, 548-9, commenting on sūra II, 188, *tudū bi-hā ila 'l-ḥukkām*, says it means *tukhāsimū bi-hā*. The Qur'ān is warning against taking property cases before *ḥākims* on account of the waste involved. This seems to indicate that this form of litigation was still practised in Medina.

¹⁰ *Fī wajbi-ka* is the common south Arabian expression today for “under your protection” and the sense would certainly fit this context well.

¹¹ For my discussion of this term, see *Studies in Arabian history and civilisation*, London 1981, IX, 232. I have collected classical references which show that this sense is ancient as well as contemporary.

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6. Let not a judgement (*qaḍā'*) which you judged yesterday, but over which you re-consulted yourself and were guided to your rectitude, prevent you from retracting to justice/right (*al-ḥaqq*), for nothing can invalidate justice/right. You must realise that retraction to justice/right is better than long persistence in a thing invalid.

7. Pay attention to comprehending what revolves disturbingly in your mind (lit. breast), that has no Qur'ān or practice (*sunna*) applicable to it, and become acquainted with similarities and analogies. Then after that compare the matters. Then have recourse to that which is most preferable to God and most in conformity of them to justice/right (*ḥaqq*) as you see it.

8. Set a term for a person who advances a plea, not being [himself] present, up to which he may come [to present his case].¹² If he produces a proof he will receive his due,¹³ but if not, you can deem it permissible to issue a judgement (*qaḍā'*) against him.

9. The Muslims are persons whose testimony is admissible (*'udūl*), with the exception of a person who has received a whipping for [an offence against morality] involving a fixed penalty (*ḥadd*), or from whom false testimony has been experienced, or one suspect on account of client relationship (*walā'*¹⁴) or kinship (*qarāba*) [to a litigant].

10. God is concerned with your secret hearts and averts [punishment] from you in accordance with outward characters.¹⁵

11. Have a care to avoid flurriedness, vexation and annoyance with the litigants (*khuṣūm*)¹⁶ in the battlefields (*mawāṭin*)¹⁷ of justice in which God confers reward and makes goodly store. For whosoever's secret heart is right in what lies between him

¹² Margoliouth's rendering here seems to me to be incorrect.

¹³ *Akḥadha bi-ḥaqqi-bi*.

¹⁴ A *mawlā*.

¹⁵ While Margoliouth's rendering has been accepted here, it still seems to me possible that, for "outward characters", "proofs" could be a valid translation for *bayyināt*. The sense would then be that if a man be proven innocent he will not be punished as a matter of course, but his motives, etc., are a matter between him and God for God to judge.

¹⁶ According to Ḥamīdullāh, *loc. cit.*, Ibn 'Abd Rabbīhi, *al-'Iqd al-farīd*, Būlāq ed., reads *īyyā-ka wa'l-tanāfur bi 'l-nās wa'l-tanakkur li 'l-khuṣūm fi 'l-ḥuqūq*, as does al-Balādhurī (in an unpublished ms.) but the Cairo 1359/1940 edn., I, 102, reads *al-ta'adhdhā*.

¹⁷ *Mawāṭin* simply seems to be "the courts".

and God, God will make right/reconcile¹⁸ what lies between him and the people; and whosoever decks himself out for the world with something other than what God knows of him, God will bring shame upon him.

The letter Abū Mūsā 2 is to be found in Ibn Abi 'l-Ḥadīd's commentary on the *Nahj al-balāgha*.¹⁹ It falls into two parts, a long introduction, mostly aphoristic, differing stylistically from the second part which contains four terse instructions from the Caliph. There can be little doubt that part 1 has been tagged on to part 2 at a considerably later date. I do not think any of part 1 can have emanated from 'Umar; but part 2, which conforms to the language and circumstances of Abū Mūsā's time, I see no reason to think was not addressed to him, and this is the assumption for the moment. The Arabic text of part 2 is given for comparison with Abū Mūsā 1 and 'Umar's letter to Mu'āwiya below.

الزم أربع خصال يسلم لك دينك وتحيط بأفضل حظك.

١ إذا حضر [لك] الخصمان فعليك بالبينات العدول والأيمان القاطعة.

٢ ثم ائذن للضعيف حتى ينسبط لسانه ويحتري قلبه.

٣ وتعاهد الغريب فإنه إذا طال حبسه ترك حقه وانصرف الى أهله.

٤ واحرص على الصلح مالم بين القضاء.

والسلام عليك.

The translation of the full version as given by Ibn Abi 'l-Ḥadīd follows.

Part 1

He ('Umar) wrote to Abū Mūsā while he was governor of al-Baṣra, "I have heard that you admit people, all and sundry, all together. So when this letter of mine reaches you, admit those of honourable status (*ahl al-sharaf*), those concerned with the

¹⁸ *Aṣlah Allāh mā bayna-hu wa-bayna 'l-nās*. Perhaps this is also a reference to conciliation (*sulḥ*) of clause 5.

¹⁹ The passage is quoted by Ḥasan al-Sandūbī in his edition of al-Jāhiz, *al-Bayān wa 'l-tabyīn*, Cairo 1375/1956, II, 171, in a footnote from the *Nahj*, but I have not traced it in the edition available to me. Ḥamīdullāh, *Majmū'at al-wathā'iq*, 357, quotes the letter without the preamble of Ibn Abi 'l-Ḥadīd, from al-Sarakhsī, *al-Mabsūṭ*, and Wakī', *Akbbār al-quḍāt*, see below, p. 70 n. 26.

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Qur'ān (*abl al-Qur'ān*) and men of piety and religion (*al-taqwā wa 'l-dīn*). When they have taken their seats²⁰ admit the commoners (*al-'amma*). Do not defer today's business till tomorrow so that affairs press on you and get neglected. Beware of those who follow [their] fancies²¹, for people have fancies which are pursued, preferred worldly things and hidden rancours. Call yourself to account in [time of] ease before the reckoning of [time of] hardship, for he who calls himself to account in [time of] ease before the reckoning of [time of] hardship will return to content and happiness, whereas he who lets his life distract him and his fancies engross him will revert to repentance and regret. None save a man of firm judgement, extreme patience, bearing no rancour or malice against his subjects²² applies God's command to the people, Do not let²³ people get to know a fault (*'awra*) of yours and fear not a critic's censure in what is right/just (*al-ḥaqq*).

Part 2.

Stick to four practices/customs, and your conduct (*dīn*) will be sound and you will attain your most abounding fortune.

1. When two opposing parties present themselves, you are responsible [for seeing to the production of] proofs, witnesses of probity²⁴ and decisive oaths.
 2. Then admit the man of inferior status (*da'if*) so that his tongue may be loosened and his heart emboldened.
 3. Look after the stranger, for when he is long detained he will abandon his suit and go back to his people.
 4. Take pains to arrive at conciliation so long as judgement (*qaḍā'*) is not clear.
- Peace upon you.

Commentary

Dīn, religion, also means *ḥukm* = *qaḍā'*, law, regulation of

²⁰ Lane's *majlas* (pl. *majālis*), places of honour upon which it is forbidden to sit without permission, could well apply here.

²¹ *Ahwā'*, passions, inclinations, heresies, etc.

²² Ibn al-Athīr, *Nihāya*, citing 'Umar's letter to Abū 'Ubayda (cf. below, p. 73), defines *ḥaṣīf al-'uqda* as *al-muḥkam al-'aql*, and *al-'uqda* here means *al-ra'y wa 'l-tadbīr*.

²³ Reading *tutli'* for *yutli'* of the text.

²⁴ *al-'udūl*, cf. below, p. 71.

affairs, etc. *Ḥaṣṣ*, fortune, is doubtless to be intended in its Qur'ānic senses.²⁵ *Da'if* is rendered as "man of inferior status", but though this is applicable to its use in Abū Mūsā I, in the circumstances of this letter it might mean the weaker of two tribal opposing parties.

The text of 'Umar's parallel letter to Mu'āwiya follows, taken from Wakī' (d. 393/1003),²⁶ evidently an earlier version than that of al-Jāhiz (150-255/767-869)²⁷ and al-Sarakhsī (d. about the last decade of the 5th/11th century). Al-Jāhiz's authority for the letter is 'Āmir al-Sha'bī (who heard from the Caliph 'Umar's son):

أما بعد فإني كتبت إليك في القضاء بكتاب لم آلك فيه ونفسي خيراً،
فالزم خصلاً يسلم دينك وتأخذ بأفضل حظك عليك.

١ إذا حضر²⁸ الخصمان فالبيئة العدل²⁹ والأيمان القاطعة.

٢ أذن الضعيف حتى يجترئ قلبه وينبسط لسانه.

٣ وتعاهد الغريب فإنه إن طال حبسه ترك حقه³⁰ وانطلق إلى اهله،
وإنما أبطل حقه من لم يرفع به رأساً.

٤ واحرص على الصلح بين الناس مالم يستبين لك القضاء.³¹

Commentary

The al-Jāhiz-al-Sarakhsī texts, virtually the same, contain certain alterations from and additions to the primitive text of Wakī', intended to clarify the sense. Both mention "five practices" (*khīṣāṣ*) in the preamble – compare with the "four" in the letter to Mu'āwiya – but there are not "five". Where

²⁵ al-Sarakhsī, *al-Mabsūt*, Cairo 1324/1906-7, xvi, 65-6, who quotes the letter to Mu'āwiya, also gives a commentary on the sense. He says it means a thing for which one is praiseworthy in the World and for which one obtains reward in the Hereafter.

²⁶ *Akbbār al-quḍāt*, Cairo 1366/1947, I, 74-5.

²⁷ *al-Bayān wa 'l-tabyīn*, ed. al-Sandūbī, II, 171.

²⁸ al-Jāhiz, al-Sarakhsī, *taqaddama ilay-ka/la-ka*.

²⁹ *Ibid.*, *fa-'alay-ka bi 'l-bayyina al-'ādila wa 'l-yamīn al-qāti'a*.

³⁰ *Ibid.*, *fa-inna-ka in lam tu'abhid-hu/tu'āhid-hu wa-inna-mā/wa-rubba-mā ḍayya'a ḥaqqā-hu*.

³¹ *Ibid.*, *'alay-ka bi 'l-ṣulḥi bayna 'l-nāsi mā lam yastabin la-ka faṣlu 'l-qaḍā'*.

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Wakī's text has *man lam yarfa*³² *bi-hi rās-an* they read *wa-āsi bayn al-nās fī lafẓi-ka wa-ṭarfi-ka* at the end of clause 3. *Wa-āsi* is unmistakably a misreading for *wa-rās-an*, and an additional clause has been created by lifting the sense from clause 3 of letter Abū Mūsā 1. It is not likely that any figure was mentioned in the originals of either of 'Umar's letters.

As the phrase *al-bayyina* (Abū Mūsā 2, *bayyināt*) *al-'udūl wa 'l-aymān al-qāṭi'a* stands, *al-'udūl* is to be understood in apposition to *al-bayyina/āt*, but al-Jāḥiẓ has misunderstood this and substitutes *al-bayyina al-'ādila*, just proof, which has little meaning. The sense in both the earlier letters is that proofs are to be produced, i.e. persons of probity as witnesses and decisive oaths. This looks like the maxim quoted in Abū Mūsā I, but which I believe to be far more ancient, *al-bayyina 'alā man idda'a wa 'l-yamīn 'alā man ankara*.

The use of the plural "oaths" is also significant, for, in 'Umar's time, *qasāma*, the fifty-fold oath taken by a tribe producing fifty men to swear, would be current practice, as it still is in southern Arabia. *Qasāma* was disliked by the urban *fuqahā'*, and al-Jāḥiẓ may have consciously made the alteration to the singular for this reason, or, familiar with courts where plaintiff and defendant were single individuals, he may have done so thinking to clarify the sense. But al-Jāḥiẓ did not hesitate to tamper with earlier texts.³³

There is probably more to clause 3 than the simple desire for justice to the stranger, for if he goes back to his tribe, then the latter will seek to obtain justice for him by taking action of an aggressive nature against his opponent, thus by-passing the central authority and threatening the security established by the Sunna Jāmi'a.³⁴

Similarly, 'Umar sees that it is dangerous to leave a dispute unsettled and urges that such cases be settled by negotiation. He refers to an earlier letter sent to Mu'āwiya.

Comparison of Abū Mūsā I with Abū Mūsā 2

The clauses of Abū Mūsā I modify Abū Mūsā 2 or are added to it, often to introduce the more developed procedure of the 2nd century A.H.

³² Variant, *yarfuq*.

³³ See my remarks in *Cambridge history of Arabic literature*, I, 143.

³⁴ See my "The *Sunnah Jāmi'ah* ...", *BSOAS* (1978), xli, 17f., repr. in *Studies in Arabian history*.

Clause 1 is a strong asseveration that the function of *qāḍī* is an established institution. It has no place in Abū Mūsā 2, and is intended to justify its existence against any opposing view.

Clause 2 may imply that the *qāḍī* should not issue a judgement which the authorities will overrule.

Clause 3 corresponds to Abū Mūsā 2, no. 2, but gives it a wider application.

Clause 4 corresponds to the content of Abū Mūsā 2, no. 1, but is a maxim perhaps already long established.

Clause 5 corresponds to Abū Mūsā 2, no. 4, but it plays down conciliation as a method of settling cases – this might not be in the interests of the *qāḍī* and seems not to be much approved.³⁵

Clause 6 has no parallel in Abū Mūsā 2.

Clause 7 is a statement of the doctrine which was evolving in the 2nd century A.H. and has no place in Abū Mūsā 2.

Clause 8 corresponds to Abū Mūsā 2, no. 3, but completely modifies its attitude and purpose.

Clause 9 deals with *'udūl*, persons of probity whose testimony is acceptable, mentioned in Abū Mūsā 2, no. 1, but takes a radically egalitarian attitude over those qualified to act as such. In tribal society, kinship would be anything but an obstacle in swearing the fifty-fold oath in *qasāma*.

Clauses 10 and 11 have no parallel in 'Umar's original letter and are moralising in tone.

Abū Mūsā al-Ash'arī and the question of qadā'

Abū Mūsā was an Ash'arī of the Wādī Rima' tribes, and I recently visited his tomb, reputed by local tradition to be in al-Ḥimā³⁶ village just east of Zabīd; but he is said to have died in Mecca or al-Kūfa, in which latter place al-Balādhurī places his tomb at *munqaṭa' al-buyūt*, i.e. where the houses stop.³⁷ He was

³⁵ Wakī', *op. cit.*, I, 75, quotes a tradition from 'Aṭā', "It is not fitting for the *qāḍī* when the judgement (*qadā'*) is clear (*tabayyan*) to arrange conciliation between them (*yusliḥ bayna-hum*)". Another tradition (al-Dārimī, *Adab*, 50; al-Tirmidhī, *Birr*, 26) runs, "He who arranges conciliation between people is not a liar (*laysa bi 'l-kādhīb man aṣlah bayn al-nās*)".

³⁶ The name of this place in itself may indicate that it had a certain sacred quality about it. Uways al-Qarnī is also reputed to be buried here, but this too seems incorrect.

³⁷ *Ansāb al-ashrāf*, IV A, ed. M. Schloessinger and M. J. Kister, Jerusalem 1971, 243. His grave was at a shop (*dukkān*), the owner of which is mentioned.

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Abū Bakr's *'āmil*, governor, of Zabīd, Rima', Aden and al-Sāhil, the coast.³⁸ His son remained in al-Kūfa and his grandson became Amīr of al-Baṣra. He seems originally to have come to the Hījāz with a band of tribal blades seeking service as soldiers, like tribal bands used to come to the Zaydī Imāms. In 17/638 'Umar appointed him to al-Baṣra and a little after this 'Umar sent him a letter, probably Abū Mūsā 2. The corresponding letter that went to Mu'āwiya is likely to have been sent at the same time, on his appointment to Syria in 18/639, and the fact that some reports state that the letter was sent to Abū 'Ubayda b. al-Jarrāh,³⁹ his immediate predecessor, would seem to fix the despatch of the letter in that year.

It has been pointed out that Abū Mūsā was *not* sent as *qādī* to al-Baṣra, but as governor.⁴⁰ It is inconceivable that the proud and unruly, independent tribes at so early a period were settling their disputes by anything but tribal *'urf* under their hereditary tribal arbiters and headmen (*'arīf*, *naqīb*),⁴¹ without regard or reference to the central authority except as the arbiter of ultimate appeal. These circumstances in themselves negate the possibility of so sophisticated a letter as Abū Mūsā 1 having been sent by 'Umar. The situation is well illustrated by the circumstances under which Abū Mūsā was briefly transferred in 22/642-3 from al-Baṣra to al-Kūfa.⁴² 'Umar had appointed as governor there 'Ammār b. Yāsir, whose father was Madhḥijī, 'Ansī, of the Yemen, a *ḥalīf* of the Banū Makhzūm. He married

³⁸ Muḥammad b. Ḥabīb, *al-Muḥabbar*, Haydarābād 1361/1942, 126. *Ibid.*, 305, describes his facial hair, which is typically Yemeni. For a general note on him, see *Ansāb al-asbrāf*, 1, 201, ed. Ḥamīdullāh, Cairo 1959. Cf. al-Ṭabarī, *Tārīkh*, ed. de Goeje *et alii*, Leiden 1879-1901, 1, 2136; Ibn al-Athīr, *Usd al-ghāba*, Cairo 1284-5, v, 246. For the Ash'arīs, see 'Umar b. Yūsuf b. Rasūl, *Turfat al-aṣḥāb*, ed. K. W. Zetterstéen, Damascus 1369/1949, 38.

³⁹ So Abū Yūsuf, *Kitāb al-Kharāj*, Cairo 1346/1927, 140.

⁴⁰ al-Ṭabarī, *Tārīkh*, 1, 2693, 'Umar's "governor (*'āmil*) over Kūfa and incidents (*abdāth*) was al-Mughīra b. Shu'ba, and over Baṣra, Abū Mūsā al-Ash'arī". His function was administrative rather than judicial.

⁴¹ al-Ḥajjāj made 'Amīr al-Sha'bī (see below, p. 75) *'arīf* for his tribe (*qawm*) and *mankīb* (= *rās al-'urafā'*, Ibn al-Athīr, *al-Nihāya*) over all Hamdān. He must have been a man of tribal standing to act in this capacity. For *naqīb*, see my "The *Sunnah Jāmi'ah*...", 10-11. See 'Amīr's biography in al-Dhahabī, *Tadhkirat al-huffāz*, Haydarābād 1375-6/1955-6, 1, 79.

⁴² Ibn Khaldūn, *The Muqaddimah*, tr. F. Rosenthal, New York 1958, 1, 453, implies that letter, Abū Mūsā I, was sent to him on his appointment to Kūfa. This seems an error, but as an instruction when replacing the incompetent 'Ammār b. Yāsir in 22/642-3 it would at least be appropriate.

an *ama*, usually meaning a black slave-girl, of a Makhzūm lord, who freed her when she became pregnant with 'Ammār – thus 'Ammār became a client (*mawlā*) of the Banū Makhzūm.⁴³ The leader of the Banū Tamīm wrote to 'Umar concerning 'Ammār, "He is no *amīr* and the way he acts is insupportable (*mā huwa fī-hi mā yaḥtamil*)".⁴⁴ Another chief (*sayyid qawmi-hi*),⁴⁵ Jarīr al-Bajalī, told 'Umar to 'Ammār's face that his *amīr* was "inadequate, not giving satisfaction, with no knowledge of how properly to conduct affairs".⁴⁶ Yet another chief called him a crop-eared slave (*abā*). Socially and administratively, 'Ammār was unequal to a task that only a tribal arbiter could perform – perhaps 'Umar had chosen him in pursuance of his known precautionary policy of keeping Quraysh in the Ḥijāz, to be interpreted as a curb on their ambitions which might be furthered by the standing they enjoyed with the tribes. In contrast to 'Ammār, "the judgement (*kalām*) of Abū Mūsā was just like a butcher who never misses the joint/point".⁴⁷

'Umar's letter addressed to the two governors of the only major territories under Muslim control at that time is to be understood as a political guideline for them. Clause 1 is only really a reaffirmation of traditional Arabian legal procedure. 'Umar b. al-Khaṭṭāb, Ibn Qutayba recounts, "recited the verse of Zuhayr b. Abī Sulmā⁴⁸ and when he came to his words, Three are the ways whereby a case/justice is decided,⁴⁹ Oath-taking, summoning before a judge (*nifār*), or proof. [To decide in any case, these ways lie before you, Three (in all), each of the bringing you appeasement (*shifā*)].

'Umar began admiring his knowledge of cases (*'ilma-hu bi 'l-ḥuqūq*) and his distinguishing (*tafṣīl*) between them, saying, 'Justice (*al-ḥaqq*) does not go beyond one of three (things), either an oath, or summoning before an arbiter (*muḥākama*), or proof that rebuts (*ḥujja*)'".⁵⁰ This in no way tallies with the opening clause of Abū Mūsā 1, which would have 'Umar declare that *qāḍī*-ship was an established ordinance.

⁴³ *Uṣd al-ghāba*, IV, 43.

⁴⁴ al-Ṭabarī, *Tārīkh*, I, 2676.

⁴⁵ *Uṣd*, I, 279.

⁴⁶ al-Ṭabarī, *Tārīkh*, I, 2677.

⁴⁷ I.e. when chopping up meat. *Mafṣil* (also related to *faṣl*, deciding a case) has both senses – hence the pun.

⁴⁸ *Dīwān*, Cairo 1944, repr. 1964, 75.

⁴⁹ Cf. *Cambridge history of Arabic Literature*, I, 123.

⁵⁰ *Uyūn al-akbār*, Cairo 1383/1963, I, 67.

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It is significant that Ibn Ḥazm remarks, "In this letter (*risāla*) are things on which they disagree with 'Umar, among them being '*al-Muslimūn 'udūl...* (The Muslims are persons whose testimony is admissible...)"'.⁵¹ In the tribal society of the first decades of Islam, the egalitarian attitude that any Muslim's testimony is admissible is not likely to have been current. In Yemeni tribal law documents which I am editing, under *Bāb al-shahāda* it is stated that in *man'a* the testimony of the tax-collector (*jabbā*), merchants and those engaged in demeaning occupations (*mihra daniyya*) is not acceptable. Though these documents are not early, the attitude they take is what would be current in the first century A.H.

This scrutiny of the documents assumes that the simple genuine letter of 'Umar, Abū Mūsā 2, was preserved by his descendants, and ultimately formed a basis for "improved" letter Abū Mūsā 1. Nonetheless, I can recall seeing no positive statement that the family did keep 'Umar's letters before the statement in Wakī's history that "Abū Mūsā made Abū Burda his executor and produced to him a writing (*kitāb*)".⁵² This is said to have contained the text of Abū Mūsā 2 which is quoted – an assertion which arouses suspicion of the reliability of the statement as evidence. Mysteriously, Qatāda is not credited with obtaining the famous expanded letter from any member of Abū Mūsā's descendants, though receiving *ḥadīth* from several of them. Perhaps, if he received it from Bilāl, the latter's bad character would eliminate him as a *thiqa* in the eyes of the traditionists, and to quote it on his authority would not validate it.

The sources of 'Umar's letters to Abū Mūsā and Mu'āwiya

It is simplest to turn first to the letter to Mu'āwiya – this is quoted by al-Jāḥiẓ on the authority of 'Āmir al-Sha'bī, the Sha'bīs being of Hamdān in the Yemen. He was at one time in charge of *al-qadā'* in Kūfa under the Umayyads. 'Āmir is

⁵¹ *al-Muḥallā*, 1, 59. al-Ṭabarī, *Tārīkh*, 1, 2135, says that Abū Bakr made 'Umar a *qādī* during his term as Caliph "and he remained a year without anyone bringing a case before him (*yukhāṣim ilay-hi*)". This seems inconsistent with other reports such as al-Ṭabarī, *Tārīkh*, 1, 2212, "It is said that in his days 'Umar had no *qādī*". Tyan, *op. cit.*, 76, quotes al-Mas'ūdī, *Tanbīh*, tr. Carra de Vaux, 254, as reporting that neither Muḥammad nor the four Rāshidūn Caliphs nominated any *qādīs*.

⁵² *Op. cit.*, 1, 70 f.

regarded as a reliable authority who claimed to commit *ḥadīths* solely to memory and not to write them down.⁵³ He was a man of integrity and honour. When he was in Medina he heard [traditions] from Ibn 'Umar, the Caliph's son, and could have discussed the letter with him. A version not touched up by al-Jāḥiẓ, nor by those who transmitted to him from 'Amir al-Sha'bī, is also given by Wakī' (see above, p. 68 n. 19). There is no apparent reason why it cannot be accepted as genuine.

It has been shown that the earliest authority in the *isnāds* for Abū Mūsā I is Qatāda b. Dī'āma (60-118/679-736),⁵⁴ but it has not been noticed that he related on the authority of Abū Burda b. Abī Mūsā and his son Sa'īd b. Abī Burda⁵⁵ "who was one of his contemporaries" and regarded as a *thiqa*.⁵⁶ Qatāda, however, also related on the authority of a much better-known member of the house, Bilāl b. Abī Burda b. Abī Mūsā.⁵⁷ There are also *isnāds* remounting to 'Abdallāh b. Abī Burda, but the situation is somewhat confused and some of the authorities suspect.⁵⁸ Qatāda is an authority who is known for his verbatim narration of *ḥadīth* as he received it. Nowhere is it stated that Qatāda received 'Umar's letter, Abū Mūsā I, from the latter's descendants, but unquestionably he could have done, and it is reasonable to presume that he did. Sufyān b. 'Uyayna (107-98/725-814), al-Jāḥiẓ's authority for Abū Mūsā I,⁵⁹ was

⁵³ al-Dhahabī, *op. cit.*, I, 79, quotes an early traditionist as saying that *mursal al-Sha'bī ṣaḥīḥ*, i.e. "traditions not traced up interruptedly to their author quoted by al-Sha'bī are sound".

⁵⁴ Ibn Hajar al-'Asqalānī, *Tabdhīb al-tabdhīb*, Ḥaydarābād 1325-7, VIII, 351 f.

⁵⁵ Ibn Hazzam, *Mulakhkhaṣ ibtāl al-qiyās wa 'l-ra'y wa 'l-istiḥsān wa 'l-taqlīd wa 'l-ta'līl*, ed. Sa'īd al-Afghānī, Damascus 1379/1960, rejects clause 7 of Abū Mūsā I on *qiyās* and *ra'y*, stating that this letter is not genuine and attacking the *isnād* "by way of 'Abdallāh b. Abī Sa'īd, he being unknown (*majhūl*)", but in this latter statement Ibn Hazzam is in error, for Abū Sa'īd is Abū Burda, who had a son 'Abdallāh whose name follows below. On the margin of the ms of this work a note appears, "On the authority of Idrīs al-Awdī who said, 'Sa'īd produced to us on the authority of Abū Burda a writing (*kitāb*) and said, 'This is the *kitāb* of 'Umar to Abū Mūsā,' and he mentioned the letter (*risāla*)'. This refers to letter Abū Mūsā I and unequivocally implicates Sa'īd as supporting the "improved" text, but one is left in doubt as to the reliability of this statement.

⁵⁶ *Tabdhīb*, III, 8.

⁵⁷ *Ibid.*, I, 500; *Akhhār al-quḍāt*, II, 25.

⁵⁸ *al-Muḥallā*, IX, 393.

⁵⁹ al-Dhahabī, *op. cit.*, I, 264, Cf. *'Uyūn al-akhhār*, III, 174.

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generally agreed to be a trustworthy narrator of *ḥadīth*, and assuming that the *rijāl* of the *isnād* linking him to Qatāda were also honest men, the redrafting of letter Abū Mūsā 2 into the "improved" Abū Mūsā 1 would have been done and conveyed to Qatāda during the latter's life-time, i.e. prior to 118/736. The evidence points in the direction of Abū Mūsā's descendants as possible composers of letter Abū Mūsā 1.

The descendants of Abū Mūsā al-Ash'arī

Abū Mūsā died in 52/672 or 42/662-3, leaving sons, one of whom was Abū Burda, 'Āmir b. 'Abdallāh, who died, aged 80, in 103/721-2. Abū Burda's mother was Jewish, but though Wakī⁶⁰ cites a poem satirising the Jewish element which thereby entered the line, Abū Burda was respected and one of the first *qādīs* of Kūfa. His son by a slave-girl emancipated after bearing her master a male child (*umm walad*), Bilāl (the name itself suggests he may have been black), rose to prominence as Amīr and Qādī of al-Baṣra. "Khālid al-Qasrī put him charge of the *qaḍā'* in the year 109/727-8, and he continued as Qādī until Yūsuf b. 'Umar came in the year 125/743 and deposed him".⁶¹

Bilāl, however able he may have been, was not a man of integrity like his father, as is evident from the tale that Abū Burda informed al-Ḥajjāj, "My son has taken bribes (*irtashā*), so depose me". Al-Ḥajjāj, however, reinstated him, but along with a colleague. "Bilāl was extremely unjust (*ẓalūm*), not caring what he did in judging (*ḥukm*) and other matters". He was, however, highly critical of incorrect Arabic and is reported to have said "That this case (*ḥaqq*) should go (away, be lost?) is preferable to me than that he should commit faults of speech (*yalḥan*)".⁶² Al-Mubarrad says that the first of the *qādīs* to show injustice (*jawr*) in judgement was Bilāl: "Bilāl used to say, 'Two men will present themselves before me and I find one of them more engaging to me (*akḥaff 'alā qalbī*) so I decide in his favour'".⁶³

Bilāl also displayed a certain arrogance,⁶⁴ saying *anā qāḍīn ibn*

⁶⁰ *Op. cit.*, 1, 33.

⁶¹ *Tabdhīb*, 1, 1325.

⁶² *Akḥbār al-quḍāt*, II, 408; cf. *Tabdhīb*, *loc. cit.*

⁶³ *al-Kāmil*, Cairo 1356/1937, 1, 395.

⁶⁴ *Akḥbār al-quḍāt*, 1, 28.

*qādī*⁶⁵ "I am a *qādī*, son of a *qādī*",⁶⁵ and he seems to have been known for snide remarks about contemporary figures. With all his cleverness, it would seem that he showed a feeling of social inferiority which, one surmises, may stem from his mother's low birth. The mingling of Arabian tribal blood with that of townsfolk of Iraq doubtless meant that a different outlook and code of conduct had developed in the house of Abū Mūsā from that of tribal arbiters.

So when one looks for the author of the letter Abū Mūsā I, attributed to 'Umar, Bilāl's character and circumstances make him a suitable candidate – an unscrupulous man who might not hesitate to improve on 'Umar's style in order to bring letter Abū Mūsā 2 into line with the more sophisticated style current in his day, and certainly a man with the competence in language to do so. The letter opens with a challenging statement on the *qādī*'s office of which Bilāl was so proud, but which many other Muslim scholars of repute throughout the ages have regarded with distaste.⁶⁶ A sense of social inferiority could explain his egalitarian attitude on witnesses (*udūl*) in clause 9. His attitude to conciliation (*sulh*), one of tolerance merely, may further reflect his pride in the office of *qādī*. It must be recognised, however, that the letter is an excellent piece of work and the code drawn up in it admirable.

If Bilāl is indeed the author of the letter, and not another member of the house of Abū Mūsā in contact with Qatāda, the rider that all the family were party to the deception is hardly escapable. A further conclusion to be drawn is that the letter is to be dated prior to Qatāda's death (118/736) or, if the *isnād* to Qatāda is rejected – and there is no reason to do so – prior to Bilāl's deposition in 125/743, or when he died, which does not seem known. This would date existence of the theory on Qur'ān-*sunna-qiyās-ra'y* (clause 7) to early in the second century A.H.

No proof is forthcoming of course that Bilāl was responsible for re-casting 'Umar's original laconic letter to his grandfather to suit the circumstances of his own day – it might have been

⁶⁵ For flattering verses of Ru'ba b. al-'Ajjāj on Bilāl, see *Akhhār al-quḍāt*, I, 33, *wa-anta ya 'bna 'l-qāḍiyayn qāḍin*, etc. Cf. Charles Pellat, "Risālat 'Amr b. Bahr al-Jāhiz fi 'l-ḥakamayn wa-taṣwīb Amīr al-Mu'minīn 'Alī b. Abī Ṭālib fi 'l-i-hi", *al-Machbrīq* (1958), LII, 431. By this time, Abū Mūsā has become recognised as a *qādī*.

⁶⁶ al-Sarakhsī, *op. cit.*, XVI, 68, quotes Ibn Mas'ūd as saying *fa-man ibtalā bi 'l-qadā' fa 'l-yaqdi bi-mā fi Kitāb Allāh*.

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Sa'īd or 'Abdallāh, other sons of Abū Burda, for the expanded letter is transmitted on their authority. But because Bilāl was a bad character, this does not mean that he could not draft good rules of procedure.

The patent link between the two letters is undeniable, though their purpose is different, for whereas 'Umar's genuine letter is concerned with a tribal society, the "improved" letter appears to have been framed rather for a centralised government to deal with a predominantly urban situation. The shift of emphasis between the earlier and later documents is in itself indicative of the way in which early Islamic society in Iraq was evolving and of the modification of its law process to suit that society.

The above is offered as a token of respect for an old friend, Professor Charles Beckingham.

Addenda

P.72/fn.36 Uways al-Qarnī/Qaranī's mother was from Kudādah of Murād (*Iklīl II*, ed. Akwa', 41).

P.75/12 An authority quoted in one of the tribal law treatises, I have now established, would have written ca. 500 H. but a long tradition lies behind this law – which it may eventually be possible to trace back to the pre-Islamic era.

P.79 To Professor M.J.Kister I am indebted for several references to authors of the late 4th to early 6th centuries H. – al-Dāraqutnī, *Sunan*, Medina, 1386/1966, IV, 206; Abū Ishāq Ibrāhīm al-Shīrāzī *al-Luma' fī uṣūl al-fiqh*, Beirut, 1405/1984, 2789; Ibn al-Jawzī *Manāqib Amīr al-Mu'minīn 'Umar b. al-Khaṭṭāb*, Beirut, 1402/1982, 129–35 & Ibn Ḥazm, *al-Ihkām fī uṣūl al-aḥkām*, Cairo, 1398/1978, 1296–1301. All refer to or quote the "improved" letter on the authority of Sa'īd b. Abī Burdah, some also citing weak authorities. Ibn al-Jawzī also quotes the brief letter to Abū 'Ubaydah b. al-Jarrāh (see p.73 supra). In this treatise of his Ibn Ḥazm again rejects the "improved" letter. Ibn al-Jawzī reports the statement of al-Shāfi': "I went to Sa'īd b. Abī Burdah and asked him about 'Umar's *rasā'il* which he used to write to Abū Mūsā and which Abū Mūsā had bequeathed to Abū Burdah", Sa'īd produced the "improved" letter. While the evidence pins the *transmission* on Sa'īd I still favour Bilāl as *author* of the "improved" version. Note the probably spurious tradition cited by Ibn al-Jawzī, that 'Umar wrote to Abū Mūsā: "Your secretary who wrote to me committed solecisms (*lahana*), so whip him." This sounds like invention by the pedantic Bilāl b. Abī Burdah (see p.77 supra).